2386.

# SUPREME COURT OF THE UNITED STATES.

## No. 55.

## ELIPHAS SPENCER, PLAINTIFF IN ERROR,

vs.

## JOHN W. LAPSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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THE UNITED STATES OF AMERICA,
*Eastern district of Louisiana.*

Circuit Court of the United States in and for the fifth judicial circuit and the eastern district of Louisiana, holding sessions in the city of New Orleans.

NEW ORLEANS, *Saturday, 14th April*, 1855.

Court met pursuant to adjournment. Present, honorable Theodore H. McCaleb, district judge; absent, honorable J. A. Campbell, presiding judge.

November term, 1854.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER. } No. 2452.

On motion of Robert Hughes, esq., of counsel for the plaintiff herein, and on presenting in court the transcript of the record of this cause, remitted to this court for trial, from the district court of the United States for the district of Texas, because of the judge of that court having recused himself on the ground of being interested therein, it is ordered that the same be filed and docketed.

Which said transcript is in the words and figures following, viz:

THE UNITED STATES OF AMERICA,
*District of Texas, to wit:*

District Court, April term, 1851.

*Petition.*

To the honorable John C. Watrous, Judge of the District Court for the district aforesaid.

The petition of John W. Lapsley, a citizen of the State of Alabama, plaintiff, against Eliphas Spencer, a citizen of the State of Texas, residing in the county of McClellan, defendant.

And thereupon, your petitioner sets forth and complains, that heretofore, to wit, on the first day of December, A. D. 1850, at, to wit, in the district aforesaid, he was seized in his demesne as of fee, of, in, and to a certain tract or parcel of land, situate, lying, and being in the county of McClellan and State of Texas, in the district aforesaid, on the left margin of the river Brazos, at the old village of Tahucanos, above and adjoining three leagues of land granted to José Antonio Manchacca: Beginning at a stake on the river, said Manchacca's upper corner, from which bears north seventy-five degrees west, twelve and six-tenths varas, a box-elder eight inches in diameter, and north

fifty-eight degrees west, eleven and eight-tenths varas, another box-elder six inches in diameter; thence north sixty-two degrees east, seventeen thousand and ninety-three varas to a stake in the upper line of said Manchacca; thence north twenty-eight degrees west, fourteen thousand and one hundred and eighty varas to a stake; thence south sixty-two degrees west, twenty-two thousand nine hundred and fifty-three varas to the river Brazos, a stake opposite to the mouth of the river Basque, from which stake bears south nine degrees east two varas, a poplar six inches in diameter, and north five and one-half degrees east nine varas, another poplar eighteen inches in diameter; thence down the river with the meanders thereof to the place of beginning; containing eleven leagues, be the same more or less, with the hereditaments and appurtenances thereunto belonging, or in anywise appertaining. And being so then and there seized and possessed of the same, the defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, with force and arms entered in and upon and took possession of the tract or parcel of land, with the hereditaments and appurtenances as aforesaid, and then and there ejected, expelled, put out, and annoyed your petitioner from the same; and continued him so ejected, put out, expelled, and annoyed for a long space of time, to wit, from thence hitherto; and other wrongs then and there did to the great injury of your petitioner; wherefore, he says he is injured and damaged to the value of $10,000, and therefore he brings a writ, &c.

The premises considered, your petitioner prays that process of citation be issued to the marshal of the district aforesaid, commanding him to summon said defendant to be and appear in the honorable court on the first Monday in the month of April next, then and there to answer this petition; that after due trial, according to the forms of law, your petitioner may have judgment for his damages as aforesaid, for the recovery of the tract or parcel of land with the hereditaments and appurtenances aforesaid, with writ of possession and other execution, or that such other judgment be rendered in the premises as the nature of the case may require; and as in duty bound he will ever pray, &c.

ROB. HUGHES,
*For Plaintiff.*

Endorsed: L, 352, 68—U. S. district court, district of Texas, March term, 1851—John W. Lapsley vs. Eliphas Spencer—Petition for trespass—Filed 11 Jan., 1851—James Love, clerk—Filed November 19th, 1853—W. P. De Nomaudie, cl'k.

*Summons.*

U. S. District Court,
*Dist. of Texas.*

The President of the United States of America, to the Marshal, or any of his lawful deputies of the District of Texas, greeting:

You are hereby commanded to summon Eliphas Spencer, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the district

of Texas, at the city of Galveston, in the first Monday of April next, to answer the petition and complaint of John W. Lapsley, against Eliphas Spencer, in an action of trespass to try title, and to plaintiff's damage ten thousand dollars, of which you will serve the said defendant Eliphas Spencer with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this thirteenth day of January, A. D. 1851, and the seventy-fifth year of the independence of the United States of America.

[L. S.]

JAMES LOVE, *Cl'k.*

Endorsed: L, 352, No. 68—United States district court—John W. Lapsley vs. Eliphas Spencer—Summons for Eliphas Spencer is issued thirteenth Jan'y, 1851—Filed Nov. 19th, 1853—Received January 15th, 1851, and executed on the 18th day of February, A. D. 1851, by service of the within suit on the defendant, and by delivering to him a true copy thereof, together with a certified copy of the plaintiff's petition, finished by the clerk—Joseph Bates, U. S. marshal, by A. M. Hughes, deputy marshal.

*Answer.*

THE UNITED STATES OF AMERICA,
*District of Texas.*

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

May term, 1851—In United States District Court.

And now comes the said Eliphas Spencer, and defendant in the above entitled , and demurs to the petition of plaintiff herein, and says that the said petition is wholly insufficient in law for the plaintiff to have or maintain his aforesaid action against this defendant, and for special causes of demurrer the said defendant here sets down and shows to the court the following:

First. That no sufficient description of the premises sued for is made, given, or set forth in or by said petition.

Second. That there is no positive and sufficient allegation (or allegations) of the citizenship of the parties, either plaintiff or defendant, to give said court jurisdiction.

Third. For that it does not appear in and by said petition, or from any part thereof, that the endorsement required by the laws of the land, nor made as required by said law.

And the said defendant says, for further answer in this behalf, that he denies all and singular the allegations in plaintiff's petition contained, wherefore, &c.

And for further answer defendant denies, that he has committed any trespasses or wrongs in manner and *forever* as alleged in plaintiff's petition, and says he is not guilty.

SWIFT & HOWARD,
*Att'ys for Defendant.*

And for further answer in this behalf the defendant says, that he is the owner in fee simple of nineteen hundred and twenty acres of land on which he now lives, and that he has been the owner of all said tract of nineteen hundred and twenty acres of land, was seized and possessed thereof, and every part thereof, from and ever since the twenty-fifth day of November, A. D. 1847; and has claimed, possessed, held, owned, and enjoyed the same in his own right against the claim and claims of any and all persons whatsoever, since said twenty-fifth day of November, 1847.

LEVETT & HOWARD,
*For the Def't.*

And for further answer defendant says, that he has made large and valuable improvements on said tract of land on which he now resides, and has so lived and resided since the 25th of Nov., 1847; that said land was then vacant and unappropriated public domain; that this defendant located upon said land in good faith, and from said 25th day of November, 1847, to the time of commencing this suit, he made large, expensive, and very valuable improvements on said land, by clearing said land, cultivating the same, and enclosing said land, or about one hundred acres thereof, with good substantial fences, and by erecting substantial dwelling-houses and other buildings thereon. Wherefore he prays judgment for said land, and for the value of said improvements, which defendant alleges to be of the value of five thousand dollars.

SWETT & HOWARD,
*Att'ys for Def't.*

And for further answer defendant says, that the original pretended grant, under which plaintiff claims to hold said land described in plaintiff's petition, was fraudulent and void, and that none of the conditions attached to or annexed to the said pretended grant, under which plaintiff claims to hold said land, were ever complied with or performed by the original pretended granted thereof.

SWETT & HOWARD,
*Att'ys for Def't.*

And for further answer in this behalf defendant says, that the pretended title of plaintiff *has* derived by and through a pretended grant of eleven leagues of land commonly known and called an eleven league grant; and all suit or action, or actions thereon, have long since been barred by the law of the land of the late republic, and now State of Texas.

SWETT & HOWARD,
*Att'ys for Def't.*

**Endorsed: L. 352, No. 68—John W. Lapsley vs. Eliphas Spencer—Answer—Filed May 12th, 1851—James Love, clerk—Filed November 19th, 1853—W. P. De Nommaudie, cl'k.**

*Transcript of proceedings at Galveston.*

In the District Court of the United States.

JOHN W. LAPSLEY
vs. } Transcript.
ELIPHAS SPENCER.

THE UNITED STATES OF AMERICA,
*District of Texas, to wit:*

At a district court of the United States, having and exercising the powers and the jurisdiction of a circuit court of the same for the district of Texas, begun and held at the city of Galveston on the first Monday in April, in the year of our Lord one thousand eight hundred and fifty-one. Present, the honorable John C. Watrous, judge of the said district; William P. Ballinger, esqr., att'y; Joseph Bates, esq., marshal, and James Love, esqr., clerk; among others were the following proceedings, to wit:

JOHN W. LAPSLEY
vs. } Trespass.
ELIPHAS SPENCER.

Be it remembered, that heretofore, to wit, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-one, the above entitled cause was continued. And afterwards at the May term of said court, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and fifty-one, this cause was continued.

DISTRICT COURT OF THE UNITED STATES,
*District of Texas.*

JOHN W. LAPSLEY
vs. } No. 352.
ELIPHAS SPENCER.

I, James Love, clerk of the district court of the United States for the district of Texas, certify that the annexed is a true and correct transcript of all the proceedings had in the above entitled cause.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, to wit, this the 21st day of October, A. D. 1851.

JAMES LOVE, *Clerk*.

Endorsed: No. 68—John W. Lapsley vs. Eliphas Spencer—Transcript of proceedings held at the town of Galveston, in the State of Texas—Filed November 19th, in the year of our Lord one thousand eight hundred and fifty-three—W. P. de Nommandie, clerk.

And for further answer in this behalf the defendant says, that he is the owner in fee simple of nineteen hundred and twenty acres of land on which he now lives, and that he has been the owner of all said tract of nineteen hundred and twenty acres of land, was seized and possessed thereof, and every part thereof, from and ever since the twenty-fifth day of November, A. D. 1847; and has claimed, possessed, held, owned, and enjoyed the same in his own right against the claim and claims of any and all persons whatsoever, since said twenty-fifth day of November, 1847.

LEVETT & HOWARD,
*For the Def't.*

And for further answer defendant says, that he has made large and valuable improvements on said tract of land on which he now resides, and has so lived and resided since the 25th of Nov., 1847; that said land was then vacant and unappropriated public domain; that this defendant located upon said land in good faith, and from said 25th day of November, 1847, to the time of commencing this suit, he made large, expensive, and very valuable improvements on said land, by clearing said land, cultivating the same, and enclosing said land, or about one hundred acres thereof, with good substantial fences, and by erecting substantial dwelling-houses and other buildings thereon. Wherefore he prays judgment for said land, and for the value of said improvements, which defendant alleges to be of the value of five thousand dollars.

SWETT & HOWARD,
*Att'ys for Def't.*

And for further answer defendant says, that the original pretended grant, under which plaintiff claims to hold said land described in plaintiff's petition, was fraudulent and void, and that none of the conditions attached to or annexed to the said pretended grant, under which plaintiff claims to hold said land, were ever complied with or performed by the original pretended granted thereof.

SWETT & HOWARD,
*Att'ys for Def't.*

And for further answer in this behalf defendant says, that the pretended title of plaintiff *has* derived by and through a pretended grant of eleven leagues of land commonly known and called an eleven league grant; and all suit or action, or actions thereon, have long since been barred by the law of the land of the late republic, and now State of Texas.

SWETT & HOWARD,
*Att'ys for Def't.*

**Endorsed: L. 352, No. 68—John W. Lapsley vs. Eliphas Spencer—Answer—Filed May 12th, 1851—James Love, clerk—Filed November 19th, 1853—W. P. De Nommaudie, cl'k.**

*Transcript of proceedings at Galveston.*

In the District Court of the United States.

JOHN W. LAPSLEY
vs. } Transcript.
ELIPHAS SPENCER.

THE UNITED STATES OF AMERICA,
*District of Texas, to wit:*

At a district court of the United States, having and exercising the powers and the jurisdiction of a circuit court of the same for the district of Texas, begun and held at the city of Galveston on the first Monday in April, in the year of our Lord one thousand eight hundred and fifty-one. Present, the honorable John C. Watrous, judge of the said district; William P. Ballinger, esqr., att'y; Joseph Bates, esq., marshal, and James Love, esqr., clerk; among others were the following proceedings, to wit:

JOHN W. LAPSLEY
vs. } Trespass.
ELIPHAS SPENCER.

Be it remembered, that heretofore, to wit, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-one, the above entitled cause was continued. And afterwards at the May term of said court, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and fifty-one, this cause was continued.

DISTRICT COURT OF THE UNITED STATES,
*District of Texas.*

JOHN W. LAPSLEY
vs. } No. 352.
ELIPHAS SPENCER.

I, James Love, clerk of the district court of the United States for the district of Texas, certify that the annexed is a true and correct transcript of all the proceedings had in the above entitled cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, to wit, this the 21st day of October, A. D. [L. S.] 1851.

JAMES LOVE, *Clerk.*

Endorsed: No. 68—John W. Lapsley vs. Eliphas Spencer—Transcript of proceedings held at the town of Galveston, in the State of Texas—Filed November 19th, in the year of our Lord one thousand eight hundred and fifty-three—W. P. de Nommandie, clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
*For the district of Texas.*

Austin, November term, 1853.

JOHN W. LAPSLEY, plaintiff,
vs.
ELIPHAS SPENCER, defendant. } No. 68.

1853, November 24.

And now on this day come the parties by their att'ys, and by agreement this case is continued until the next term of this court.

*Order.*

IN THE DISTRICT COURT OF THE UNITED STATES,
*For the district of Texas.*

Austin, November term, 1854.

JOHN W. LAPSLEY, plaintiff,
vs.
ELIPHAS SPENCER, defendant. } No. 68.

1854, December 9th.

This day came the plaintiff aforesaid by his attorney, and on motion of said plaintiff by his attorney, the judge now presiding states and enters upon the record that he has an interest with the plaintiff in the land in controversy in this suit, which in his opinion renders it improper for him to sit in the trial of the same; and thereupon the court upon further motion orders, because there is no circuit court of the United States in this State, that an authenticated copy of this order, and of all the record and proceedings in this action, be forthwith certified to the circuit court of the United States for the eastern district of the State of Louisiana, at New Orleans, that court being the most convenient of the United States circuit court in adjoining States.

DISTRICT COURT OF THE UNITED STATES,
*District of Texas.*

I, William P. de Nomandie, clerk of the district court of the United States for the district of Texas, at Austin, hereby certify, that the foregoing eighteen pages contain a true and perfect copy of all the original papers and proceedings in this court, in the cause wherein John W. Lapsley is plaintiff, and Eliphas Spencer is defendant.

In testimony whereof I hereunto set my hand and affixed the seal of said court at the city of Austin, this ninth day of February, [SEAL.] A. D. 1855, and of the independence of the United States the 79th year.

W. P. DE NOMMANDIE, *Clk.*

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April Term, A. D. 1856.

New Orleans, Monday, 28*th April*, 1856.

Present, hon. Theo. H. McCaleb, district judge; absent, hon. J. A. Campbell, presiding judge.

*Motion to dismiss Cause.*

John W. Lapsley
vs.
Eliphas Spencer. } 2452.

The defendant herein this day moved the court, by his counsel, Messrs. Wolfe & Singleton and Lewis & Herring, to dismiss this case for the reasons following:

1st. Because the record shows that the hon. John C. Watrous, judge of the federal court within and for the State of Texas, before whom this suit was instituted, has an interest with the plaintiff, Lapsley, in the land in controversy in this suit.

2nd. Said interest disqualified said Watrous from entertaining any motion, or making any order in this case.

3rd. All orders herein made by said Watrous are ipso facto void.

4th. This court has not jurisdiction of the parties or subject-matter in controversy in this suit.

*Amended Answer.—Filed* 28 *Apl.*, 1856.

John Lapsley
vs.
Eliphas Spencer. } No. 2452.

And now comes the said defendant, by his attorneys, (leave of the court first had and obtained,) and amending his answer herein heretofore filed, says:

The grant under which the said plaintiff claims is and was ab initio null and void, by reason of the fraud and illegality in the issuance of the same, in this:

First. The agent, Williams, who obtained the concession, was empresario at the time, and could not represent the government and private citizens applying for concessions in Austin and Williams's Colony.

Second. The consent of Austin was not obtained; the location of said grant in his colony was fraudulent and illegal.

Third the consent of both Austin and Williams was necessary to the validity of any and all grants in their colony exceeding one league. Williams had no authority to act for Austin, and no authority could have been delegated to him by said Austin in such case.

Fourth. The title to said grant was not legally extended by officers designated by law for that purpose, and the fee to said land never passed out of the Government.

Fifth. Said land was not actually surveyed in consummation of this grant. The person who was ordered to make said survey does not return it over his official signature. Francis W. Johnson, who purports

IN THE DISTRICT COURT OF THE UNITED STATES,
*For the district of Texas.*

Austin, November term, 1853.

JOHN W. LAPSLEY, plaintiff,
vs.
ELIPHAS SPENCER, defendant. } No. 68.

1853, November 24.

And now on this day come the parties by their att'ys, and by agreement this case is continued until the next term of this court.

*Order.*

IN THE DISTRICT COURT OF THE UNITED STATES,
*For the district of Texas.*

Austin, November term, 1854.

JOHN W. LAPSLEY, plaintiff,
vs.
ELIPHAS SPENCER, defendant. } No. 68.

1854, December 9th.

This day came the plaintiff aforesaid by his attorney, and on motion of said plaintiff by his attorney, the judge now presiding states and enters upon the record that he has an interest with the plaintiff in the land in controversy in this suit, which in his opinion renders it improper for him to sit in the trial of the same; and thereupon the court upon further motion orders, because there is no circuit court of the United States in this State, that an authenticated copy of this order, and of all the record and proceedings in this action, be forthwith certified to the circuit court of the United States for the eastern district of the State of Louisiana, at New Orleans, that court being the most convenient of the United States circuit court in adjoining States.

DISTRICT COURT OF THE UNITED STATES,
*District of Texas.*

I, William P. de Nomandie, clerk of the district court of the United States for the district of Texas, at Austin, hereby certify, that the foregoing eighteen pages contain a true and perfect copy of all the original papers and proceedings in this court, in the cause wherein John W. Lapsley is plaintiff, and Eliphas Spencer is defendant.

In testimony whereof I hereunto set my hand and affixed the seal of said court at the city of Austin, this ninth day of February, [SEAL.] A. D. 1855, and of the independence of the United States the 79th year.

W. P. DE NOMMANDIE, *Clk.*

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April Term, A. D. 1856.

New Orleans, Monday, 28*th April*, 1856.

Present, hon. Theo. H. McCaleb, district judge; absent, hon. J. A. Campbell, presiding judge.

*Motion to dismiss Cause.*

John W. Lapsley
vs.
Eliphas Spencer. } 2452.

The defendant herein this day moved the court, by his counsel, Messrs. Wolfe & Singleton and Lewis & Herring, to dismiss this case for the reasons following:

1st. Because the record shows that the hon. John C. Watrous, judge of the federal court within and for the State of Texas, before whom this suit was instituted, has an interest with the plaintiff, Lapsley, in the land in controversy in this suit.

2nd. Said interest disqualified said Watrous from entertaining any motion, or making any order in this case.

3rd. All orders herein made by said Watrous are ipso facto void.

4th. This court has not jurisdiction of the parties or subject-matter in controversy in this suit.

*Amended Answer.—Filed* 28 *Apl.*, 1856.

John Lapsley
vs.
Eliphas Spencer. } No. 2452.

And now comes the said defendant, by his attorneys, (leave of the court first had and obtained,) and amending his answer herein heretofore filed, says:

The grant under which the said plaintiff claims is and was ab initio null and void, by reason of the fraud and illegality in the issuance of the same, in this:

First. The agent, Williams, who obtained the concession, was empresario at the time, and could not represent the government and private citizens applying for concessions in Austin and Williams's Colony.

Second. The consent of Austin was not obtained; the location of said grant in his colony was fraudulent and illegal.

Third the consent of both Austin and Williams was necessary to the validity of any and all grants in their colony exceeding one league. Williams had no authority to act for Austin, and no authority could have been delegated to him by said Austin in such case.

Fourth. The title to said grant was not legally extended by officers designated by law for that purpose, and the fee to said land never passed out of the Government.

Fifth. Said land was not actually surveyed in consummation of this grant. The person who was ordered to make said survey does not return it over his official signature. Francis W. Johnson, who purports

to have made this survey, did not, in fact, make this survey, or any other in that region of country. It does not appear that a surveyor, markers and chain-carriers, or either, were designated and sworn as required by law in such cases. And defendant *[further says, that the apparent legal title to the land in controversy was fraudulently conferred upon and vested in said plaintiff by collusion between said plaintiff and the hon. John C. Watrous, Thomas M. League and Thos. J. Frow, in order to litigate and establish said fraudulent grant before the federal court of Texas, presided over by the said hon. John C. Watrous. And defendant avers, that said Watrous and League, citizens of the State of Texas, and said Frow, a citizen of Alabama, are equally interested, and are the only real parties in interest in said fraudulent grant.]

Wherefore, defendant prays that said plaintiff's petition be dismissed at his cost, and for general relief.

WOLFE & SINGLETON,
LEWIS & HERRING,
*Att'ys for Deft.*

April Term, A. D. 1856.

NEW ORLEANS, THURSDAY, 1*st May*, 1856.

Present, honorable Theodore H. McCaleb, district judge; absent, honorable J. A. Campbell, presiding judge.

*Judgment on Motion to dismiss cause.*

JOHN W. LAPSLEY
vs. } 2452.
ELIPHAS SPENCER.

The motion herein made on the 28th ultimo to dismiss this cause for the reasons assigned, came on this day to be heard, and was argued by Messrs. Singleton and Herring for the plaintiff in motion, and by Rob. Hughes, esq., for the defendant; and the court having considered the same, ordered that said motion be overruled.

April Term, 1856.

NEW ORLEANS, THURSDAY, 1*st May*, 1856.

Present, honorable Theodore H. McCaleb, district judge; absent, honorable J. A. Campbell, presiding judge.

*Motion to strike out Plea, and Order thereon.*

JOHN W. LAPSLEY
vs. } 2452.
ELIPHAS SPENCER.

The plaintiff herein, by his counsel, Rob. Hughes, esq., moved the court to strike out the last plea in the amended answer filed by the de-

* This stricken out by order of court of date 1st May, 1856.

J. W. GURLEY, Cl'k.

fendants herein, on the ground that the defence thereon made is a plea in abatement, and the defendant having previously pleaded in bar; whereupon, after argument of counsel, it was ordered that the said plea be stricken out.

April Term, 1856.

NEW ORLEANS, TUESDAY, 13*th May*, 1856.

Present, honorable Theodore H. McCabe, district judge; absent, honorable J. A. Campbell, presiding judge.

*Motion for leave to file Amended Answer, and Order thereon.*

JOHN W. LAPSLEY vs. ELIPHAS SPENCER. } 2452.

Marcus D. Herring, esq., of counsel for the defendant, moved the court for leave to file an amended answer, or plea in abatement in this cause, which application was resisted by Rob. Hughes, esq., on part of the plaintiff; when, after argument of counsel, it was ordered that the application be refused and leave denied.

*Defendant's Bill of Exceptions to the refusal of the Court to allow Amended Answer or Plea in abatement.*

Be it remembered, that in the above entitled case, on the 13th day of May, A. D. 1856, the said defendant, by his attorneys, offered to amend his pleadings herein by a plea in abatement, supported by the affidavit of said defendant, and propounding interrogatories to the said plaintiff, numbering from one to thirty-one, inclusive, all of which will appear by said plea, affidavits, and interrogatories, which are hereto annexed and made a part of this bill of exceptions; which said plea in abatement was rejected by order of the court, and the said defendant was not allowed the benefit of said plea, and the answers of said plaintiff to said interrogatories; to which ruling of the court the said defendant by his counsel excepted, and tendered this his bill of exceptions for the signature of the court, in order that the same might be properly certified to the Supreme Court of the United States. This bill of exceptions is allowed, but without passing any opinion whether it is a proper subject for exceptions.

THEO. H. McCALEB,
*U. S. Judge.*

***Plea in abatement annexed to the foregoing Bill of Exceptions, offered for filing by defendant's attorney, 13th May, 1856, and leave refused.***

In the Circuit Court of the United States for the eastern district of Louisiana.—April Term, A. D. 1856.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

And now comes the said defendant, and amending his original and amended answers hereto filed, herein says, that said plaintiff ought not further to have and maintain his said action, because he says that said plaintiff is only the legal or nominal holder or owner of the grant of land claimed by him, said plaintiff, in his petition; and defendant further says that this court hath not jurisdiction of this cause or suit, for the reason following, to wit:

The apparent legal title to the land in controversy was fraudulently conferred upon and vested in said plaintiff by collusion between said plaintiff and the honorable John C. Watrous, Thomas M. League, and Thomas J. Frow, in order to litigate and establish said fraudulent grant before the federal court of Texas, presided over by the said Hon. John C. Watrous; and defendant avers that said Watrous and League, citizens of the State of Texas, and said Frow, a citizen of Alabama, are equally interested and were the parties in interest in said fraudulent grant, and were the parties in interest at the time of the pretended transfer of said grant to said Lapsley, and said parties were domiciliated as aforesaid at the time of the institution of this cause or suit in the said federal court of Texas.

All of which this defendant is ready to verify; and offering to verify, puts himself upon the country, and prays judgment, &c.

SINGLETON & HERRING,
*For Defendant.*

I, Eliphas Spencer, defendant in the cause or suit aforementioned, do solemnly swear that the facts and allegations set forth in the above and foregoing plea are true, to the best of my knowledge and belief; and I do further swear, that the answers of said plaintiff to the annexed interrogatories propounded to him are material to sustain said plea, and to aid me in my defence thereof; and that I know of no other person in this State by whom I can substantiate said plea.

E. SPENCER.

Sworn to and subscribed before me this 13 May, 1856.

J. W. GURLEY, *Cl'k.*

And the said Eliphas Spencer further swears, that he did not know, nor had he any means of ascertaining, the fraudulent combination mentioned in the aforesaid plea; nor did affiant know of the facts set forth in the said plea, until long after he filed his plea to the merits or

the general issue in this cause or suit; and affiant swears that he did not make said plea when he plead the general issue, because he was not aware of the facts contained in said plea at that time.

E. SPENCER.

Sworn to and subscribed before me in open court, this 13th May, 1856.

J. W. GURLEY, *Cl'k.*

Sworn to and subscribed before me this 13th May, 1856, as amended.

J. W. GURLEY, *Cl'k.*

Interrogatory 1st. Do you own the entire interest, legal and equitable, in and to the land in controversy in this suit; if nay, state what other person or persons have an interest with you, and where they reside?

Interrogatory 2nd. If there are other owners, what is their interest; the price paid or to be paid by each? Who was present when League transferred said land to you, and where was said transfer made?

Interrogatory 3d. What consideration (if any) did you actually pay for said land, and to whom, where and when did you make such payment?

Interrogatory 4th. Do you own any real, unconditional interest in said land? If yea, state what interest, the price you paid for it, or agreed to pay, and the person or persons with whom you contracted?

Interrogatory 5th. State where, how, and through whom you first heard of the grant of land in controversy?

Interrogatory 6th. Did you not receive your first knowledge of this grant from the Hon. John C. Watrous, or through his agency?

Interrogatory 7th. When and where did you first become acquainted with Thomas M. Legue?

Interrogatory 8th. Did not your acquaintance with said League commence in your negotiation with him about the land in controversy, or about that time?

Interrogatory 9th. When and where did you first know or become acquainted with the Hon. John C. Watrous?

Interrogatory 10th. Are you in any way related to said Watrous; have not your relations with the said Watrous been of an intimate and confidential character?

Interrogatory 11th. Did not the Hon. John C. Watrous advise you to become the purchaser of the land in controversy?

Interrogatory 12th. Did not said Watrous converse with you about said land, the nature and validity of the title, and the character of the soil, prior to the date of your deed thereto? If yea, state the substance of what he said to you about said land, and state fully and particularly all he said about the title to said land.

Interrogatory 13th. Was not the fact that John C. Watrous was, or was to be, a party in interest with you in said *law*, the chief induce-

ment, or an inducement, or moving cause, of your becoming interested therein; and have you not so stated, or words to that substance?

Interrogatory 14th. Do you not know, or do you not believe, that if said Watrous had not been or was not to have been a party in interest with you in said land, that you would not have had any connection with said land as the vendee thereof from said League; have you not so stated, or words to that substance?

Interrogatory 15th. Previous to your negotiation for said land, did you have any knowledge of the history, character, and validity of 11 league grants of land in Texas? If yea, state fully the source and means of information.

Interrogatory 16th. Did not said Watrous execute a mortgage upon land in Robertson county, Texas, or at any other place, to *from* or any other person to secure the sum of $2,000, or any other sum, as the whole or part consideration for his interest in the grant of land in controversy in this suit? If yea, state if said mortgage-deed was recorded, the value of said land in Robertson county, (if you know it,) and if said sum has been paid off and discharged by said Watrous, and fully; how, where, when, and to whom paid?

Interrogatory 17th. At the time of your purchase or transfer of the La Vega 11 league grant, or pending your negotiations therefor, were you uninformed by said Watrous, League, Frow, or any one else, that the object or reason for, or an object or reason for, your becoming the sole legal owner thereof, was to bring suit, and test or try the title of said land in the federal court of Texas?

Interrogatory 18th. Was it not discussed, or agreed, or understood by and between you, said Watrous, League and Frow, or either or any of you, or any one else for them or any one of them, that you should become the recipient of the legal title to said land, in order to litigate it before his honor Judge John C. Watrous?

Interrogatory 19th. Since the transfer of said grant of land to you by said league, have you had any communication with the Hon. John C. Watrous respecting the litigation for said land, or about the probable result of any suit or suits for the trial of the title thereto; if yea, state fully the import of such communication, when and where had?

Interrogatory 20th. Do you not know or believe that since the institution of this suit the Hon. John C. Watrous has advised or suggested to some one or more of the defendants, or settlers in said land, to purchase their quiet or compromise with yourself or Thomas M. League, or with any one else owning an interest with you in said land?

Interrogatory 21st. Since the transfer of said grant of land to you, has not Thomas M. League had the chief control and management of the same; has he not been the principal actor and actual manager in the institution and prosecution of this and all other suits instituted in your name for said land?

Interrogatory 22nd. After the transfer of said land to you; did not the control and management of said League over and upon the same

continue about the same and to the same extent as it was before said transfer?

Interrogatory 23rd. Was it not at any time understood and agreed by any or all the parties concerned or in interest with you, that the interest of the Hon. John C. Watrous in the land in controversy should not be disclosed?

Interrogatory 24th. Was not said Watrous, according to your knowledge or belief, in embarrassed pecuniary circumstances at the time of the transfer of said grant of land to you?

Interrogatory 25th. What interest has Robert Hughes, esq., present or prospective, or any person or persons for him or with him, in the grant of land in controversy or in the proceeds thereof; if any, state what that interest is, and upon what dependent?

Interrogatory 26th. Has Sophia St. Johns or Samuel M. Williams or either of them, or any person for them or either of them, any interest, or reserved interest, in said grant of land or in the proceeds thereof; if yea, state the character of such interest?

Interrogatory 27th. Is there not or has there not been some agreement or understanding between you and said Frow, or Watrous, or League, that in the event of your gaining said grant of land, you were to convey to said parties or either of them some part of said land; or to divide the proceeds thereof with said parties or either of them; if yea, state fully such agreement or understanding, the time when, and the place where made; if evidenced by writing, state (if you know) in whose possession such writing is; and if you have said writing, attach the original or a true copy to your answer to this interrogatory.

Int. 28. Did you not in the year 1851 or '52, or at any other time, received a proposition from a Mr. Evans of McLennun county, Texas, or from any other person, or a proposition to buy a part of said grant of land; and in answer to said proposition did you not say in substance that you were only the legal owner of said land, that there were several other parties in interest with you, some of whom reside in Texas; that you would have to confer with said parties before you could give a definite answer to said proposition?

Int. 29th. Did you not, during the year 1853 or '54, write a letter to Mr. Bidwell of Texas, or any other person, wherein you substantially stated that Thomas M. League was a part owner of said land, and that whatever he (said League) should do in selling said land or in compromising the suits therefor, would be satisfactory to you?

Interrogatory 30th. Do you not know or believe, or have you not information, that Thomas M. League has conveyed, or obligated himself to convey, all his interest in the land in controversy in the suit of some person or persons? If any, state when and where said conveyance or agreement to convey was made, and the consideration paid or promise to be paid.

Interrogatory 31st. Do you not know or believe, or have you not information, that it was agreed, or that it was the subject of conversation by or between the parties interested with the plaintiff in the land

in controversy, that the said Thomas M. League should convey or relinquish his legal and equitable interest, or either, in the land in controversy, in order to qualify, or apparently qualify, himself (the said League) to become a witness for the plaintiff in this suit?

In the Circuit Court of the United States for the 5th Circuit and Eastern district of Louisiana—Spring Term, A. D. 1856.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

*Affidavit and Plea of non est factum.*

Eliphas Spencer, sworn in open court, says, that the decree purporting and alleged to be the act of the most excellent señor governor, granting in sale eleven leagues each to José Maria de Aguirre, Rafauel de Aguirre and Tomas de la Vega, alleged by Santiago del Valle, secretary, in the following words, to wit:

A copy of its original which exists in the archives of this office, in my charge, to which I refer, from where this copy was ordered to be taken by disposition of his excellency the governor, Leona Vicario, June 13th, 1830, is not the act of his excellency the governor, nor was it done or executed by his order or authorization; but affiant believes that the same was executed long after the date of said attestation by Santiago del Valle, by and through the agency and contrivance of Samuel W. Williams, and being so executed was a fraud upon the government and a nullity. Affiant further swears that the decree dated Leona Vicario, May 2nd, 1832, and signed "Lelona," "Santiago del Valle, secretary," is not the official act of the then governor of the State of Coahuila and Texas; nor was it done or executed by his order or authorization; but affiant believes that the same was fraudulently executed in October, 1833, by or through the agency or contrivance of said Samuel M. Williams.

Affiant further swears that the survey of the grant of land claimed by plaintiff, signed "F. W. Johnson," without date, and purporting to be made in pursuance to the order or decree of "Lessassier," dated Oct. 3rd, 1833, addressed to the principal and scientific surveyor, Francis W. Johnson, was not made by said Johnson at all; nor was said survey made by any legally authorized surveyor in pursuance of said order or decree of Lessassier, but the same was a forgery and a fraud upon the government.

And affiant further swears, that the power of attorney by virtue of which Samuel M. Williams sold the grant of land claimed by plaintiff, which said power is referred to, and attempted to be proven by the deposition of James Hewitson, was never in fact executed by Tomas de la Vega, the alleged grantee of said land; nor was said power of

attorney executed by the authorization, or with the knowledge and consent of said Tomas de la Vega.

E. SPENCER.

Sworn to and subscribed before me this 13th May, 1856.

J. W. GURLEY, *Clk.*

Filed in open court, with leave thereof, and in presence of counsel, 13th May, 1856.

J. W. GURLEY, *Clerk.*

*Notice of filing Title-papers.*

THE UNITED STATES OF AMERICA,
*Eastern district of Louisiana, to wit:*
Circuit Court—April Term, 1856.

JOHN W. LAPSLEY
vs.
ELEPHAS SPENCER. } No. 2452.

*Trespass to try Title, &c.*

The plaintiff in the above stated case, or Messrs. Herring, Walker and Singleton, their attorneys, are hereby notified, that, in the case of Lapsley vs. Spencer, No. 2452, above named, as attorney for the plaintiff, I have this day filed with the papers of said case the following deeds, to wit:

1. The deed from Thomas de la Vega, by his attorney in fact, Samuel M. Williams, to M. B. Menard and Nathaniel F. Williams, in trust for the benefit of Sophia J. St. John, dated first day of May, 1840, and

2d. On the same sheet of paper with the last, a relinquishment or release by said Thomas de la Vega, by his attorney in fact, Samuel M. Williams, to the said Sophia J. St. John, dated 1st July, 1850.

3d. A deed from M. B. Menard and Nathaniel F. Williams to Thomas M. League, dated 1st July, 1850.

4th. A deed from Thomas M. League to John W. Lapsley, dated 1st July, 1850.

5th. A deed of relinquishment and release from Sophia J. St. John to said Thomas M. League, dated 8th day of July, 1850.

Which deeds, upon the certificates of probate and recording thereof, will be offered as evidence in behalf of the plaintiff on the trial of the above stated case, as recorded instruments.

Your ob't s't,

(Signed) ROB. HUGHES, *for Plaintiff.*

May 20th, 1856.

We hereby acknowledge and accept service of the above and foregoing notice, this 20th May, 1856.

(Signed) HERRING & SINGLETON,
JAS. C. WALKER.

*Agreed Statement of Facts.—Filed 28 May*, 1856.

J. W. LAPSLEY
vs.
ELIPHAS SPENCER.

In U. S. District Court for the fifth circuit and Eastern district of Louisiana—Spring term, A. D. 1856.

It is hereby agreed by and between the undersigned attorneys for said plff. and deft., that the following statement of facts may be admitted and read as evidence on the trial of said case, and on the trial of all the other cases pending in said court, wherein said Lapsley is plaintiff and others are defendants, involving the grant of eleven leagues of land, to wit:

That Sophia St. Johns, the assignee of said grant from Samuel M. Williams as attorney in fact, never did reside in the republic or State of Texas; that at the time of said transfer by said Williams, said Sophia was an alien; that said Sophia St. Johns at that time was a feme covert, and that her husband was living at the time when said Sophia sold said land to Thomas M. League; that said Sophia St. Johns was the sister of said Samuel M. Williams and of Nathaniel Williams, one of the parties who held said land in trust for said Sophia. It is further agreed that Howard, of the legal firm of Swett & Howard, was living in Galveston when the deposition of Hewetson was taken by A. M. Hughes.

ROBT. HUGHES,
*for Plff.*
WOLFE & SINGLETON,
*of Counsel for Deft.*
H. D. HERRING,
*of Counsel for Defts.*

April Term, A. D. 1856.

NEW ORLEANS, *Wednesday, 28th May*, 1856.

Present, Hon. J. A. Campbell, presiding judge; present, Theo. H. McCaleb, district judge.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.
2452.

*Trial of Cause.*

This cause came on to be heard, and the following jury were sworn and empannelled to try the same: J. W. Burbridge, Charles H. Lee, B. M. Horrell, James H. Suydam, Chester Hillard, W. H. Cook, James J. Bard, G. W. Miller, Martin Gordon, S. A. Kingsland, H. H. Bryan, and J. C. Ricks. Evidence was heard and the cause proceeded with until 2 o'clock p. m., whereupon it was continued until to-morrow at 10 o'clock a. m.

NEW ORLEANS, *Thursday, 29th May*, 1856.

Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

JOHN W. LAPSLEY
vs. } 2452.
ELIPHAS SPENCER.

*Trial of Cause.*

This cause was resumed before the court and jury, and both parties having closed their evidence, it was argued by Rob. Hughes, esq., on part of plaintiff, and by Messrs. Singleton and Walker, on part of the defendant, and proceeded with until 2 o'clock p. m., and thereupon continued until 4½ o'clock this afternoon.

*Evening session.*

JOHN W. LAPSLEY
vs. } 2452.
ELIPHAS SPENCER.

Mr. Walker, of counsel for the defendant herein, resumed his argument, and having concluded at 6 o'clock p. m., the cause was continued until to-morrow.

April Term, 1856.

NEW ORLEANS, *Friday, 30th May, A. D.* 1856.

Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

JOHN W. LAPSLEY
vs. } 2452.
ELEPHAS SPENCER.

*Submission and Verdict.*

This cause was resumed, and was argued by Messrs. Herring and Walker, for defendant, and by Rob. Hughes, esq., for the plaintiff; and thereupon S. A. Kingsland was appointed foreman of the jury, and after charge from the court they retired to their room to deliberate upon their verdict, and shortly thereafter they returned the following into court; "We the jury find for the plaintiff the land described in his petition, and assess the damage at one dollar. New Orleans May 30th, 1856. S. A. Kingsland, foreman." Whereupon it was ordered that the verdict be recorded.

*Defendant's Bill of Exceptions, No. 2.*

J. W. LAPSLEY
vs. }
ELIPHAS SPENCER.

United States Circuit Court for the fifth circuit, for the Eastern district of Louisiana.

Be it remembered, that on the trial of this cause the pl'ff by his

counsel offered the testimony of Jas. Hewetson, and the document marked A, referred to by said witness in his testimony; and the *pl'ff* by his counsel objected to the same being read in evidence on the following grounds:

1st. That the document marked exhibit A, and referred to by the witness, Hewetson, should have been annexed by the commissioner taking the testimony to the testimony itself, properly marked, identified and enclosed in the same envelope with the testimony of Hewetson, and addressed to the court in accordance with law.

2nd. That the fact that said document A was delivered to the plff's agent after it was identified, and sworn to by the witness, and not annexed to the testimony and not enclosed in the same envelope which enclosed the testimony, rendered the same inadmissible in evidence, and it ought not to have been allowed to go to the jury, although the attorney for the pl'ff proved to the jury of court, that it was the same document referred to by the witness, Jas. Hewetson.

3rd. That the testimony "de bene esse" of Hewetson ought not to have been read in evidence, because it was shown that Robert Howard, one of the counsell for defendant, of record, lived in Galveston at the time his testimony was taken, and was not notified to attend.

4th. That A. M Hughes, the commissioner, appears to be the agent of the plaintiff, and has assisted in preparing this case for trial.

5th. That the document A, referred to by the said witness Hewetson, purports to be a copy of an original on file in a certain office; and it was not shown by evidence of any kind that Juan Gonzales was the proper custodian of the original, or the keeper of said office.

6th. That there was no evidence to show that Juan Gonzales had any right or authority by law to give certified copies from said office, and that a sworn copy of said document A should have been produced. That the absence of the original of said document A was not sufficiently accounted for, and it was not shown that the original could not have been produced; that there was no evidence shown that said document A was entitled the weight and importance of a notarial act; there being no proof that the officer who executed the same had authority to execute such acts.

7th. That the commissioner should have identified said document A, by signing his name on the same, and referring to it in some manner, so as to remove all doubt as to its identity. That the commissioner made no mark of any nature or description on said document, except to write the letter A on it; that his certificates referring to said document were on separate pieces of paper, and merely pasted to the document A, which pieces of paper could have been easily detached from document A, and been easily annexed to any other document upon which the witness Hewetson might have made the letter A and written his name. That there was nothing to show that the document A, introduced in evidence, was the same referred to by the witness Hewetson when he gave his testimony before the commissioner, except the evidence of plaintiff's counsel.

8th. That the document was not proved as required by the registra-

tion laws of Texas, and could not have been admitted to record by the laws of Texas, and was no evidence of title to land, and therefore inadmissible in this court.

9th. That said document was not sufficiently proved by said Jas. Hewetson, because he did not state how he obtained his knowledge of the writings sworn to by him. He should have stated how he obtained his knowledge of the signatures sworn to by him, in order that the court and jury might be able to judge of its sufficiency, as will appear from said document A and testimony of Hewetson hereunto annexed and made part of this bill of exceptions. All of which objections were overruled by the court, and the testimony of Hewetson and the document A referred to by said witness were allowed to go to the jury, and were read in evidence; to which ruling the deft. excepted, and tendered this his bill of exception for the signature of the judge, to the end that the *signature of the judge to the end that the* same might be properly certified to the Supreme Court of the United States.

The judges sign this bill of exceptions with the statement that there was satisfactory evidence that Robert Howard was not the attorney of the defendant at the time of the taking of the deposition, and that there was no such evidence as is stated in the 4th objection, and that the court was of opinion that the document A was competent evidence without any proof contained in the deposition, and that there was evidence that the document A was the same paper exhibited to the witness, that it was in the same state in which it was when presented to him.

J. A. CAMPBELL,
*Presiding Judge.*
THEO. H. McCALEB,
*U. S. Dist. Judge.*

*Deposition of James Hewetson, annexed to foregoing Bill of Exceptions.*

Deposition of Hewetson, annexed to foregoing Bill of Exceptions.

THE UNITED STATES OF AMERICA,
*District of Texas, to wit:*

Be it remembered, that on this twenty-third day of February, A. D. 1855, I, Archibald M. Hughes, a commissioner of affidavits and bail in civil cases in the courts of the United States, duly appointed by the district court for the district aforesaid, at the request of Robert Hughes, attorney for the plaintiff herein, this day called and caused James Hewetson to be and appear before me at my office in the city of Galveston, in the district aforesaid, between the hours of nine o'clock of the forenoon and six of the afternoon, to testify, and the truth to say in a certain action at law and matter of controversy, now depending and undetermined in the circuit court of the United States for the eastern district of Louisiana, at New Orleans, wherein John W. Lapsley is plaintiff, and Eliphas Spencer is defendant, in behalf of the plaintiff. The said James Hewetson being of lawful age, and being by me first

examined and cautioned, and sworn to testify the whole truth in regard to the matter of controversy aforesaid, deposeth and saith as follows, to wit:

That he is acquainted with the handwriting of Juan Gonzales, whose certificate and signature to the original testimonio of the power of attorney purporting to be executed by José Maria and Rafrel Aguirre and Tomas Vega, in the city of Leona Vicario, on the fifth day of the month of May, one thousand eight hundred and thirty-two, before the said Juan Gonzales, regidor of said city, and second alcalde in turn, and which is now presented to him; and that from his knowledge of the handwriting of said Juan Gonzales, he does verily believe that the whole of said testimonio, including the certificate and signature of said Juan Gonzales, is in the handwriting of said Gonzales; that he is also well acquainted with the handwriting of José Manuel Moral and José Nazario Ortis, the persons who purport to be assisting witnesses to said testimonio, and he is well satisfied, and does verily believe that the signatures to said testimonio, "José Naz. Ortis" and "J. M'l Moral," are in the handwriting of said Ortis and Moral. That said Gonzales and Ortis, when living, resided in the State of Coahuila. They are now both dead. Said Moral now resides in said State of Coahuila, in the now so-called republic of Mexico, and is as he believes now there. The testimonio above spoken of, in order to identify it, is marked A, and his, this deponent's signature thereon, and which the commissioner taking this deposition has certified to be the document referred to in this deponent's evidence, and has been returned to plaintiff's agent.

And further this deponent saith not.

JAS. HEWETSON.

Erased in 17th and 18th line from bottom of first page the words "he is well satisfied and does," and the words "he does" interlined before signing.

A. M. HUGHES, *Com'r*.

And I, the said Archibald M. Hughes, the commissioner aforesaid, do certify that the reason for the taking the deposition of the said witness is, that the said witness, the said James Hewetson, resides and lives in the city of Saltillo, in the Republic of Mexico, more than one hundred miles from the city of New Orleans, the place of trial of the action at law, or matter of controversy aforesaid; and I do further certify, that I gave no notice to the said Eliphas Spencer, or his attorney, to be present at the taking this deposition, and to put interrogatories, if he or they thought proper; because neither the said Eliphas Spencer or his attorney is within one hundred miles of the city of Galveston, the place of the caption of this deposition, and where the same is taken; and I do further certify, that being attended by the witness, as stated in the caption, after being duly sworn, he testified in my presence as before set out, which was reduced to writing by me in the presence of the witness, and by him signed in my presence; and I do further certify, that I am not of counsel or attorney to either of the parties in the action at

law, or matter of controversy aforesaid, or in any manner whatever interested in the event of the same. I have retained this deposition to be sealed up, directed and transmitted to the circuit court aforesaid, in accordance with the act of Congress in such case made and provided. Given under my hand and seal, this twenty-third day of February, A. D. 1855, aforesaid. [L. S.]

A. M. HUGHES, *Com'r.*

*Power of Att'y from Tomas Vega to Sam'l M. Williams.*

Power of Att'y from Vega to Williams.

Seal Second, [L. S.] Twelve Rials.

For the term of 1832 and 1823.

In the city of Leona Vicario, on the 5th day of the month of May, 1832, before me, the citizen Juan Gonzales, regidor of the illustrious ayuntamiento of this city, and second alcalde in turn in it and its jurisdiction, by reason of the sickness of the proprietary, who acts for a delegate judge, in the absence of the notary public, of whom there is none in the terms of the law, and the instrumental witnesses who are mentioned at the end, appeared present the citizens licentiate Jose Maria Aguirre, Thomas Vega and Rafael Aguirre, residents of this city, to whom I give credit, know and *saw*: That in the most extensive form which has place in right, they declare, agree and confer all their power, or as much as is required, and in right may be necessary, on Mr. Samuel May Williams, a resident of the town of Austin, especial, to that in the name of the appearees, and on representation of their proper persons, rights and actions, as soon as the law of colonization of the 24th day of March, 1825, permits, he can and may proceed according to his will, to the sale of the leagues of land which on the 14th day of June, 1830, the supreme government of the State conceded to the appearees; to which end, our said attorney can contract the sale or sales of the aforementioned leagues to the person or persons he thinks proper, whether for ready money or credit, at the time or times agreed upon, securing the amount of dollars for which he may sell said leagues, for the whole, to the extent necessary or which may be necessary; they give and confer the present power, without any limitation, the appearees desiring as they do desire, that by reason of the failure to insert a clause requisite, or condition which is not here expressed, this power may not fail to work the end for which it is conferred, inasmuch as everything as far as necessary is given for, inserted and agreed to, as if it were actually written, with a free, full, and general administration and faculty of adjudication and attestation, and that he may substitute, revoke the substitution and nominate others anew, who, as to every thing that may assist in form, and that every thing may stand which shall be done and practised by virtue of this power, the appearees bind themselves, with their persons and goods, present and future, and with them submit themselves to the seniors the judges and justices, who can and ought to take

cognizance of their business and causes, so that they may compel and force them, by all the vigor of the law, and as if it were upon sentence passed, on the authority of a thing adjudged, consented to, and not appealed from, which for such they receive it, renouncing their proper domiciliary right and residence, and all law which can favor them, with that in general of form. Thus they agreed and signed, being witnesses the citizens Antonio Espinosa, Rafael de Leon, and Francisco de la Fuente and Gonzales, present and residents of this city. I certify.

JUAN GONZALES,
JOSE MARIA AGUIRRE,
THOMAS VEGA,
RAFAEL AGUIRRE.

Taken from the original, with which it agrees, on this the day of its date, given on two useful leaves of paper of the second seal, in conformity to law. All of which I, the undersigned judge, subscribe, acting with two of my assistants according to law. I certify.

JUAN GONZALES.

Ass.: JOSE NAZO. ORTIS,
Ass.: J. ML. MORAL.

*Defdts. Bill of Exceptions, No.* 3.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

U. S. Circuit Court for the 5th circuit and Eastern dist. of Louisiana.

Be it remembered, that on the trial of the above entitled cause the pl'ff by his counsel offered in evidence the deposition of Jas. Hewetson, in which said witness Hewetson says, that the document marked "Exhibit A," and having the signature of said witness thereon, by way of identification, is together with the certificate and signature of Juan Gonzales to said document all in the handwriting of said Juan Gonzales, as will appear by reference to the deposition of said Jas. Hewetson, and the said document A annexed to and made a part of one of the bills of exceptions accompanying this record (see page ); and in order to impeach or discredit the testimony of said Jas. Hewetson, the defendant by his counsel offered to introduce experts who had never seen a writing of the officer before, to prove that the body of said document "A" and the name Juan Gonzales, signed thereto, were not written by the same person, and the court refused to allow experts to be sworn and introduced for that purpose; to which ruling of the court the defendant by his counsel excepted and tendered this his bill of exceptions, to the end that the same might be properly signed by the court and certified to the Supreme Court of the United States.

J. A. CAMPBELL,
*Associate Justice S. C. U. S.*
THEO. H. McCALEB,
*U. S. Dist. Judge.*

*Defendant's Bill of Exceptions, No. 4.*

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER. } No. 2452.

Be it remembered, that on the trial of this cause it appeared in evidence that the document purporting to be the order of the governor to the original petition, dated June fourteenth, eighteen hundred and thirty, of José Maria de Aguirre, Raphael de Aguirre and Tomas de Labega, for eleven leagues of land, each, was not signed by the governor and was without date.

The certificate of Santiago del Valle, secretary, to the copy of said purported order, is dated "Leona Vicario, June 13th, 1830." The petition of Williams, as agent of Jse. Maria de Aguirre, Rafael de Aguirre and Tomas de Labega, to be put in posession of the land conceded to his principals by virtue of said pretended grant, situated in the colony of Austin and Williams, address to the alcalde of the village of Austin, dated October 3d, 1853, was referred by Lessassier to the Empresarios Austin and Williams for their approbation, and the approbation was signed by Williams alone—signed thus: "Samuel M. Williams, for himself and as attorney for his associate;" all of which papers, with the certificates and translations, appear in this record; there being no evidence on the trial that Williams had any authority to act for his associate. The scientific surveyor, Francis W. Johnston, was ordered to the survey, and the return to that order was signed "F. W. Johnston," and was without date. It also appeared in evidence by the deposition which forms a part of the record of Francis W. Johnston, principal surveyor of Austin and Williams Colony at that time, that he did not make the survey of the land in question; that he did no surveying in the region of country where this land is situated; that he had a deputy surveyor by the name of Wm. Moore, who surveyed in that region of country, but that he never returned any of the surveys made by the said deputy without first approving them, dating them, and signing them officially. It also appeared in evidence that Tomas de Labega, the grantee of this land, was a citizen of the republic of Mexico, and never did reside in the republic or State of Texas. It also appeared in evidence that Samuel M. Williams in 1840, acting as the agent of Tomas de Labega, conveyed said land to N. F. Williams and M. B. Menard, in trust for Sophia J. St. John, and recited in said deed that he had a power of attorney from Tomas de Labega for that purpose. Said Sophia J. St. John resided in the State of Connecticut, and never did reside in the republic or State of Texas; and that she was the sister of said N. F. and S. M. Williams.

It was admitted that certain absent witnesses would give in evidence that the land in controversy was in the colony of Robertson, and that said colony was subsisting and in full force, and was recognised by the then government of Coahuila and Texas, at the time the title of possession was applied for and obtained, and also that the land in con-

troversy was within the municipality and jurisdiction of San Antonio de Bexar. The map of Texas was in evidence, from which it appeared that San Felipe de Austin was nearer and nearer in consequence to this land than Bexar. The defendant produced no evidence of any title to the land in controversy, and no evidence of possession beyond two or three years was given.

Upon which evidence, in connection with other facts appearing in the record of this cause, the df't by his counsel asked the court to give the following charges to the jury, hereto annexed, which the court refused. But the court, instead of the special instructions asked either by the pl'ff or defendant, instructed the jury as is hereafter set forth, (see post page .) To which refusal of the court to charge as instructed the defendant excepts, and prays the court to sign and seal the bill of exceptions, which is done accordingly.

J. A. CAMPBELL,
*Associate Justice S. Court U. S.*

*Instructions to Jury asked by Defendant and referred to in foregoing Bill of Exceptions.*

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

The court is asked by the defendant's attorneys to charge the jury in this case as follows, to wit:

1st. The plaintiff must recover upon the strength of his own title and not on the insuffiency of the defendant's.

2nd. The plaintiff must show or deraign a perfect title from the government of Coahuila and Texas to himself, in order to recover.

3rd. In order to find for the pl'ff, the jury must be satisfied that all the material allegations of the petition have been proven, and that the land claimed and described in said petition was granted to Tomas de la Vega.

4th. Although the acts of an officer attested by his official signature and seal (if he uses a seal) are prima facie evidence of their correctness and of his power to act, yet this presumption ceases when his acts are not officially attested.

5th. The jury must be satisfied that Samuel M. Williams was clothed with the power of the citizen "Thomas de la Vega," a resident of the city of Leona Vicario, authorizing him to ask and solicit the possession of eleven leagues of land in favor of said Thomas de Vega.

6th. The jury must be satisfied from evidence aliunde that "Lesassier" was the alcalde of the town of Austin, inasmuch as he acts upon the petition of Samuel M. Williams addressed on the 3rd October, 1833, to the alcalde of the town of Austin, without attesting said act officially, or showing therein that he had any authority to act as such officer.

7th. If the jury are satisfied from the evidence that Lessasier was the alcalde of the town of Austin, and was the proper person to pass upon

the petition of said Williams; and to order the same to be passed to the seniors Empresarios Austin and Williams for their approbation; then in order to find for plaintiff, they must be further satisfied that both Austin and Williams acted upon said petition, and give their approbation thereto.

8th. An authority given to two cannot be executed by one; and if jury do not find it proved affirmatively that S. M. Williams had authority to act for Stephen S. Austin in granting the concession, then the jury must find for the defendant.

9th. An officer cannot delegate the duties or powers of his office without express authority of law.

10th. The act of an attorney in fact when called in question is invalid, unless supported by proof of authority from the principal.

11th. The attorney in fact, in exercising his power as such, must do so in the name of his principal.

12th. In order to find for the plaintiff, the jury must be satisfied that "the scientific surveyor Francis W. Johnson" made the survey of the "eleven leagues of land" described in plaintiff's petition.

13th. If the jury find from the evidence that the government through its proper officer, to wit, the governor, did not concede in sale, in conformity to article twenty-four of the law of colonization of the 24th day of March, 1825, the eleven leagues of land claimed by plaintiff, to Thomas de la Vega, they will find for the defendant.

14th. An instrument of writing purporting to emanate from an officer of the government, such as a deed of sale, and the like, without the signature of such officer thereto, or without the name and official capacity of such officer therein, confers no power and vests no right.

15th. When an agreement or disposition of property can only operate by writing, an instrument referring to another must describe it so clearly that by the description it may be identified.

16th. A conveyance of land by an attorney in fact cannot be made, unless the instrument of writing which authorizes the attorney to make the conveyance describes the land with the same certainty as is requisite to pass the title to the particular estate conveyed by deed. The attorney must be expressly empowered to sell the identical land which he describes and conveys in the name of his principal.

17th. Title to land obtained through fraud is void. Fraud is a question of fact which the jury must decide from all the circumstances; it cannot be presumed; it must be a conclusion from facts, that will not admit of any other construction consistent with fair dealing.

18th. Those claiming under a void grant have no right.

19th. A defendant in an action of trespass to try title can interpose a superior outstanding title in a third person.

20th. If the jury are not satisfied that the grantee of the land in controversy alienated it, and that the plaintiff has exhibited his deed therefor, properly authenticated as his act, they will find for the defendant.

21st. In order to find for the plaintiff the jury must be satisfied from

the evidence that Thomas Vega, who gives a writing purporting to be a power of attorney to Samuel M. Williams, offered in evidence by plaintiff in connection with the witness Hewitson's deposition, is the same identical person to whom the alleged grant of eleven leagues of land purports to have been made.

22nd. An assignee who claims lands conveyed by an attorney in fact has no title, unless his deed is in conformity with and accompanied by the power of the assignor, strictly pursuing "in form and substance" the special authority; and any act or deed not agreeable thereto, nor warranted thereby, must be void.

*22nd.* If the jury are satisfied that the power of attorney offered in evidence was executed by Tomas de la Vega (the purported grantee of the land) to Samuel M. Williams, then before they can find for the plaintiff they must be further satisfied that said Williams was empowered thereby to sell the particular described land in controversy, and they must be further satisfied that said power is properly authenticated for record in Texas, in conformity with the laws of registration of that State.

23rd. In order to find for the plaintiff, the jury must be satisfied that Tomas de la Vega empowered Samuel M. Williams to sell the land claimed by plaintiff.

It is settled by the constitution of the republic of Texas, that no alien shall hold land in the republic of Texas except by titles emanating directly from the government of the republic of Texas; and if the jury find from the evidence that the legal or equitable title to the in controversy was in Thomas de la Vega, a citizen of the republic of Mexico, or Mrs. Sophia St. John, a citizen of the State of Connecticut, after the 17th day of March, 1836; and that either said Thomas de la Vega or Mrs. Sophia St. John was an alien to the republic of Texas, then the jury must find for defendant. Hartley's Dig., p. 42.

25th. That all persons who were not resident citizens of the republic of Texas on the 17th day of March, 1836, were aliens within the purview of the constitution of the republic of Texas.

26th. That by the laws of Spain in force in Coahuila and Texas in the year 1834, a foreigner could not hold land in the State of Coahuila and Texas; and if the jury find that either the legal or equitable title to the land claimed by pl'ff was in Mrs. Sophia St. John in the year 1834, and that Mrs. Sophia St. John was then an alien to the State of Coahuila and Texas, then the jury must find for the defendant.

27th. That if the jury find that Samuel M. Williams was guilty of fraud in obtaining from the government the title to the land claimed by the plaintiff, then Thomas de la Vega, his principal, is effected by the taint and legal consequences of the fraud of Williams, his agent, and the jury must find for the defendant. 9 Texas R. 602.

28th. If the jury believe from the evidence that the land in controversy is situated within the limits of the colony of Austin and Williams, they must find for def't.

29th. If the jury believe from the evidence that the land in controversy is situated in the colony of Robertson, they must find for the df't.

30th. If the jury believe from the evidence that the land in controversy is situated in the municipality of San Antonio de Bexar, they must find for def't.

31st. If the jury believe from the evidence that the alcalde extended the title to Williams without the original grant being presented to him, but simply had before him an authentic copy, the grant itself is void and they must find for the def't.

32nd. If the jury are satisfied from the evidence that at the time Lessasier extended the title, to wit, on the 4th day of October, 1833, no survey of the land had been made and returned to said Lessasier by Francis W. Johnson or by some legally authorized deputy of his, they will find for df't.

*Charge of the Court to the Jury.*

The court in substance instructed the jury, that the plaintiff was entitled to recover only upon the production of a valid title to the possession of the land which he claimed of the def't.

He had undertaken to do this by the production of a grant from the government of the Mexican States of Coahuila and Texas, to one Tomas de la Vega, and titles to himself deduced from that person.

In reference to the grant, the court charged the jury that the governor was authorized to make a sale of eleven leagues of land in the manner set forth in the petition, and the decree of that officer upon it, and that the paper produced was competent evidence of such a contract.

In reference to the survey, location and title in form, which forms a part of the evidence, the court charged that the court was required to take notice of the organization of the *the* States of Coahuila and Texas, and who were competent officers to perform the duties imposed in the decree of the governor upon the petition of La Vega. The court charged that there was no such organization of the colonies of Robertson or Austin and Williams, as to render it indispensable for the grantee to apply to a commissioner for distribution to perfect the grant of the governor. That those colonies were not empresa's in the sense in which that term was employed in that decree. And that having reference to the location of the land and the situation of the parties, as shown by the evidence, the alcalde of San Felipe de Austin was a proper officer for taking the measures proper for the perfection of the grant. That the grant was sufficient to appropriate the land embraced in it. That having issued from a competent authority to a qualified grantee upon a league and valid consideration, it was operative to vest the land in the grantee if the land was sufficiently defined.

The court instructed the jury, that if the land could be defined it was not material that the persons could not find the corner trees specified, or that there were inaccuracies in the measurements of distances; nor could the grant be defeated in this action by proof that the principal surveyor did not in person perform the work, or that the survey was made before the order to make it was given. That if there was such

a line as the north line of the Manchacca grant, terminating on the river, or such a point as the point called for on the Brazos river, at the termination of the survey, the land could be located, and the grant appropriated it until it was annulled by a competent authority.

The court further instructed the jury, that there was no evidence before the jury of fraud in the making of the grant which would serve as a defence against it, in their action.

The court instructed the jury, that it was necessary for the plaintiff to connect themselves with the title of La Vega by valid conveyances. That the power of attorney to Williams contained sufficient authority to him to sell three leagues of land, if it was executed by the grantee, Thomas de la Vega; that the fact that the power was signed Thomas Vega is of no consequence if the person is the same as the grantee.

That the evidence was very strong of the identity. The power purported to be given by three persons who were united in the first petition in the place where the grant was issued; and where they resided, before a public officer at the place, who certifies he knew them. The power was given to the person who had located the grant, and acted on behalf of this person under his authority.

That the grantee and no person claiming from him disputed the power or the sale, but a stranger without any title, and who had adduced no independent evidence to disprove the case of the plaintiff as to the identity of the donee of the power.

That the power was acted on in 1840, and subsequent conveyances had been taken, and no evidence of any contrary claim from La Vega had been shown.

That these transactions took place a long while ago, when the country was unsettled, the land comparatively of little value, and the organization of the State incomplete; and that the presumptions were in favor of the transactions unless upon strong proof to the contrary, or coming from persons having a right in the land. And with these observations the question was submitted.

The court further charged the jury, that the fact that Sophia St. John was a resident and native of the State of Connecticut in 1840, at the date of the conveyance to her trustees, was of no importance in this action.

*Defdts. Bill of Exceptions, No. 5.*

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

U. S. Circuit Court for the 5th Circuit and Eastern Dist. of Louisiana.

Be it remembered, that on the trial of the above entitled cause, the court erred in instructing the jury as follows: "The court further instructs jury that there was no evidence before the jury of fraud in the making of the grant, which would serve as a defence against it in this action." And the defendant by his counsel excepted to the said

instruction of the court, for the reason that fraud is a question of fact for the finding of the jury.

And the court further charged the jury as follows: "That the power of att'y to Williams contained sufficient authority to sell these leagues of land if it was executed by the grantee, Thomas de la Vega. That the fact that the power was signed Thomas Vega was of no consequence if the person was the same as the grantee; that the evidence was very strong of identity, the power purported to be given by the three persons who were united in the first petition in the place where the grant was issued, and where they resided, before a public officer of the place who certifies he knew them. The power was given to the person who had located the grant and acted on behalf of this person under his authority." To which charge the defendant by his counsel excepted, upon the ground that it was a matter of fact for the jury to find from the evidence whether Hosea Maria Aguirre, Rafael Aguirre and Thomas Vega, who executed said power of attorney, were in fact the same persons who petitioned the government for land over the names of Hosea Maria de Aguirre, Rafael de Aguirre and Thomas de la Vega.

And the court further charged the jury as follows: "That the grantee and no person claiming from him disputed the power or the sale; but a stranger without any title, and who had adduced no independent evidence to disprove the case of the plaintiff as to the identity of the donor of the power." To which charge the defendant by his counsel excepted, upon the ground that the plaintiff was bound in order to recover, to show by clear proof that the grantor of said power of attorney, to wit, Thomas Vega, was in fact Tomas de la Vega.

The court erred in charging the jury, that the fact that Sophia St. Johns was a resident and native of the State of Connecticut in 1840, at the date of the conveyance by Samuel M. Williams as the agent of Tomas de la Vega to her trustees, was of no importance in this action; because neither said Tomas de la Vega, being a citizen of Mexico, an alien to the republic of Texas; nor Sophia St. Johns, being also an alien, could hold land in the republic of Texas except by title emanating directly from the republic of Texas.

The court further charged the jury, that a survey of the grant of land claimed by plaintiff was not necessary to the validity of the grant, provided there had been a previous survey by which the land could be defined; and that the testimony of the principal surveyor, Francis W. Johnson, was entitled to no weight, as there was no evidence of the forgery of his name in this case. Whereupon, the defendant called the attention of the court to the affidavit of defendant alleging forgery, hereto annexed, and made a part of this bill of exceptions, and then the court instructed the jury that said affidavit or plea of forgery was entitled to no consideration as evidence in the cause, and that the said Johnson could not disclaim the official act so as to defeat a survey which he may have adopted and certified; which said testimony of said Johnson is hereto annexed and made a part of this bill of exceptions. To all of which defendant by his counsel excepted, and tendered this

his bill of exceptions, in order that the same might be signed by the court, and properly certified to the Supreme Court of the United States.

J. A. CAMPBELL,
*Asso. Justice S. C. U. S.*

THEO. H. McCALEB,
*U. S. Dis't Judge.*

Nota.—The charge given by the court is set forth in the bill of exceptions, and reference is made to that for an explanation of the bill of exceptions; for the charge see ante, page 55.

*Plea of non est Factum, annexed to bill of ex.*

Plea of non est factum will be found ante, page 26.

*Deposition of S. W. Johnson.*

Being unable, on account of sickness, to be present at the examination of Francis W. Johnston in the case of Lapsley vs. E. Spencer, I must ask him, in continuation of his testimony, to answer the following questions: Who surveyed the land about which you are testifying, if you did not?

Was that person a legally qualified, and sworn deputy surveyor? Was he your deputy?

Did you adopt his act in surveying this grant, by signing your name to the field notes of survey, and returning them to the proper office?

Was it customary for surveyors to appoint deputies and receive their work and return it as their own to the proper office?

Did you not do this in many cases, besides the one under consideration?

Did not other surveyors do the same; was it not a common practice; would it not have been impracticable for surveyors personally to have made every survey required of them?

THOS. HARRISON.

THE STATE OF TEXAS,
*County of Binleson.*

JOHN LAPSLEY vs. ELIPHAS SPENCER. } No. 2452.

JOHN LAPSLEY vs. JAMES BARTON. } 2453.

JOHN LAPSLEY vs. DAVID BARTON. } No. 2454.

JOHN LAPSLEY vs. JOHN BARTON. } No. 2455.

JOHN LAPSLEY vs. JAMES MARLIN. } No. 2456, 2457, 2458, 2459, 2461, and 2462.

Pending in the circuit court of the United States for the fifth circuit and eastern dis't of Louisiana, on change of venue from the federal court of the United States for the western district of Texas, holden at the city of Austin, spring term, A. D. 1856.

Be it remembered, that on this the 24th day of March, one thousand eight hundred and fifty-six, I, Landay Shoemake, *at* notary public in and for said State and county, duly commissioned and sworn, upon application of M. D. Herring, attorney for the defendants hereinafter named, caused Francis W. Johnson to be and personally appear before me, at the residence of James Borens, in the said county of Bruleson and State of Texas, to testify and the truth to say, in behalf of the defendants, in certain actions at law, or matters in controversy, now depending and undetermined in the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in New Orleans, wherein John Lapsley is plaintiff, and Eliphas Spencer, James Barton, David Barton, John Barton, James Marlin, George Bernard et als., are respectively defendants; there being present, M. D. Herring, and said Francis W. Johnson, being about fifty-six years of age; and said Johnson being by me first examined, cautioned, and sworn to testify the whole truth, in answer to interrogatories propounded by the said Herring, deposed as follows, to wit:

I arrived in Texas in August, A. D. 1826. In the fall of 1832 I was appointed principal surveyor of Austin and Williams's Colony; in the winter of eighteen hundred and thirty-two, and in the spring of A. D. 1833, and in the winter of 1833, and the spring of 1834, I was engaged in making surveys in what is known as Roberson's Colony, and then Austin and Williams's Colony; the surveys on the Brazos river *was* commenced at the old San Antonio road, and thence continued up said river near the mouth of San Andres or Little river, a short distance above what then was called the forks of said river; other work done by me was on the San Antonio road; I never made any surveys on the east side of the Brazos river above the mouth of San Andres or Little river, which empties into the river Brazos a short distance above the old town of Nashville.

I have examined a certified transcript of translation of title to a eleven leagues of land granted to Tomas de la Vega, Samuel M. Williams, attorney, situated in McLennan county, dated at Austin the 17th day of February, A. D. 1854, and signed S. Crosby Coner; wherein the survey of said land purports to have been made by F. W. Johnson, on the left margin of the River Brazos, at the place where there is *and* Tahuacno Indian village, and in front of the Waco Indian village. I did not survey said land, and cannot state that said survey was ever made. William Moore was a deputy, and was engaged in making surveys above the mouth of San Andres or Little river. All work done by deputies was before returned to the office, was examined, approved and dated, and signed officially by me. The aforesaid survey

is situated in what is known as Roberson's Colony, then as Austin and Williams Colony. Neither Austin or Williams resided in the limits of what is known as Roberson's Colony.

In answer to interrogatories propounded by Thomas. Harrison, attorney for plaintiff, which are hereunto attached, said witness, Johnson, deposes as follows, to wit:

In answer to first interrogatory he says: I do not know; if at all by William Moore.

In answer to 2nd interg. William Moore was a legally authorized and appointed deputy of mine.

In answer to interrogatory 3rd. I have no recollection of this particular grant or the field notes thereof, as I have before stated, work done by my deputies before returned was examined, approved, dated and signed officially by me.

In answer to interrogatory 4th. It was not.

In answer to interrogatory 5th. In all cases where my authority extended.

In answer to interrogatory 6th. No other surveyors had any deputies; as before stated, I was the principal surveyor of Austin and Williams Colony. It not only would have been impracticable for surveyors personally to have made every survey required of them, but it would have been for their deputies, also; and further this deponent saith not.

F. W. JOHNSON.

And I, Landay Shoemake, notary public as aforesaid, do certify that the reason for taking the foregoing deposition is, that said Francis W. Johnson resides in Ellis county in the State of Texas, and now is in Binlison county aforesaid, both of which said counties are more than one hundred miles from New Orleans in the State of Louisiana, the place of trial of the actions at law or matters in controversy aforesaid. And I do further certify, that notice was given to Thomas Harrison, attorney for said plaintiff, Lapsley.

*Judgment.*

April Term, A. D. 1856.

New Orleans, *Friday*, 30*th May*, 1855.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

John W. Lapsley
vs.
Elephas Spencer. } No. 2452.

*Trespass to try Title.*

This day came the parties aforesaid by their attorneys, and thereupon came a jury of lawful men, to wit: S. A. Kingsland, J. W. Burbridge, Cha's H. Lee, B. M. Howell, Jas. H. Suydam, C. Hillard, W. H. Cook, Jas. J. Bard, G. W. Miller, Martin Gordon, H. H. Bryan and J. C. Ricks, who being sworn well and truly to try the

issue joined, upon their oaths do say: "We the jury find for the plaintiff the land described in his petition, and assess the damage at one dollar. New Orleans, May 30th, 1856. S. A. Kingsland foreman." It is therefore considered by the court that the plaintiff John W. Lapsley recover of the defendant, Eliphas Spencer, the tract or parcel of land in his petition mentioned and described, with the hereditaments and appurtenances thereunto belonging, with the damages aforesaid by the juros aforesaid, in form aforesaid, assessed, also his costs by him about his suit in this behalf expended, amounting to the sum of

And it is further ordered that the said plaintiff have execution of this judgment by writ of habere facias possessionem, and by fieri facias as required by law, either to Texas or in this district.

Judgment rendered 30th May, 1856. Judgment signed 4th June, 1856.

(Signed) J. A. CAMPBELL,
*Asso. Just. Sup. Court.*

*Petition of Appeal.—Filed 31st May*, 1856.

U. S. Circuit Court, Eastern district of Louisiana.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

The petition of Eliphas Spencer, defendant herein, respectfully represents that he is aggrieved by the judgment herein rendered against him on 30 May, 1856, and is informed that there is error therein to his prejudice, wherefore he prays that a writ of error be allowed him therefrom, returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas on his giving bond and security, conditioned according to law, in such sum as the court may direct; and he will ever pray, &c.

SINGLETON & HERRING, *of counsel for Df't.*

NEW ORLEANS, *Saturday, 31st May*, 1856.

Present, Hon. J. A. Campbell, presiding judge; Theo. H. McCaleb, district judge.

JOHN W. LAPSLEY
vs.
ELIPHAS SPENCER.

*Motion, and Order for Writ of Error.*

On motion of M. D. Herring, esq., of counsel for defendant, and on representing to the court that the said defendant is aggrieved by the judgment rendered against him herein on the 30th instant, and that he is advised that there is error therein to his prejudice, and that he is desirous of having a writ of error therefrom to the Supreme Court of the United States, the same to operate as a supersedeas, it is ordered that a writ of error be allowed, as asked, on defendant's giving bond conditioned according to law in the penal sum of two thousand dollars, with good and solvent surety thereon.

*Bond for Writ of Error.—Filed 7 June*, 1856.

Know all men by these presents, that we, Eliphas Spencer as principal and Tom. Henderson and Geo. P. Black as sureties, are held and firmly bound unto Jno. W. Lapsley in the full and just sum of two thousand ($2000 00) dollars, to be paid to the said Jno. W. Lapsley, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this seventh day of June, in the year of our Lord one thousand eight hundred and fifty-six. Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, at New Orleans, in a suit depending in said circuit court, wherein Jno. W. Lapsley is plaintiff, and Eliphas Spencer is defendant, judgment was rendered against the said Eliphas Spencer, and the said Eliphas Spencer having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jno. W. Lapsley, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next: Now the condition of the above obligation is such, that if the said Eliphas Spencer shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ELIPHAS SPENCER, [L. S.]
TOM. HENDERSON, [L. S.]
GEO. P. BLACK. [L. S.]

Sealed and delivered in the presence of—A. LAVISSON.

UNITED STATES OF AMERICA,
*Circuit Court of the United States, fifth Circuit and Eastern District of Louisiana.*

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 72 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had in the case of John W. Lapsley vs. Eliphas Spencer, No. 2452 of the docket, so far as the same now remain of record or on file in said court.

[L. S.] Witness my hand and the seal of said court, at the city of New Orleans, this 15th day of July, A. D. 1856.

J. W. GURLEY, *Clerk*.

*Writ of Error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the Judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the Eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you,

or one of you, between John W. Lapsley and Eliphas Spencer, a manifest error hath happened, to the great damage of the said Eliphas Spencer, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this seventh of June, in the year of our Lord one thousand eight hundred and fifty-six.

J. W. GURLEY,
*Clerk of the United States Circuit Court*
*for Eastern District of Louisiana.*

*Citation in Error.*

THE UNITED STATES OF AMERICA.

The President of the United States, to John W. Lapsley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and Eastern district of Louisiana, wherein Eliphas Spencer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this seventh day of June, in the year of our Lord one thousand eight hundred and fifty-six.

J. A. CAMPBELL,
*Associate Justice of the Supreme Court U. S.*

*Marshal's Return.*

Received June 7th, '56, and on same day served copy of the within citation in error on Judge Robert Hughs in person, in the city of New Orleans, and returned June 7th, 1856.

H. DUFELHY, *D'y Marshal.*

## ADDITIONAL RECORD.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

*Translation of the original title of possession despatched by Luke Lessassier, alcalde of San Felipe of Austin, on the 4th day of October*, 1833.

Mr. ALCALDE of the town of Austin:

The citizen Samuel M. Williams, the manner which has better place in right and under the useful and necessary protestations, present myself and say, that I am clothed with the power of the citizen the licentiate José Maria Aquirre, Rafael Aquirre, and Thomas Vega, residents of the city of Leona Vicario, authorizing me to ask and solicit the possession of eleven leagues of land in favor of each one of my constituents, by which to obtain the right according to the regulation of article twenty-four of the law of Colonization of the State, of the 24th day of March, 1825, by means of the sale which the supreme government of the State conceded them, of the date of the 14th day of June, 1830, as is shown by the authenticated copy of the original document despatched by the secretary of the same supreme government, which original has been annexed to the despatch formed in favor of the citizen Thomas Vega, and the referred to copy is presented to you for the corresponding ends. And it being convenient for my parties to take their lands at different points, in their names I request, by means of your justice, that you please to command to be given to me the title of personal possession of eleven leagues of land on the left margin of the river Brazos, at the point where there is a town of the savages which is called "Tahuacano," opposite to that of the Huecos, within the colony of the Señors Empresarios Austin and Williams, they giving their approbation, and also under the knowledge that by the superior order of the date of the 2d of May, 1832, of the supreme government, you have the authority to give this possession which is annexed to the despatch formed in favor of the citizen, José Maria de Aquirre, praying you command the doing whatever act may conduce to the interest of my party, in the knowledge of which I offer to cultivate in conformity to that provided by the law, and to comply with the other obligations of the same. Therefore, I beg you to please to attend to this petition, in which I will receive grace and justice.

Town of Austin, 3d October, 1833.

SAMUEL M. WILLIAMS.

TOWN OF SAN FELIPE OF AUSTIN, *the 3d of October*, 1833.

Presented and allowed, as asked for. This shall be passed to the Señors Empresarios Austin and Williams, so that they may show what is proper concerning this proceeding, and, having their approbation, it

shall pass to the scientific surveyor, Francis W. Johnson, to make a survey of the eleven leagues denounced by the attorney of Thomas de la Vega, so that in view of it, and of the classification which he ought to make of it according to law, the corresponding title and sale be extended. Annex the documents referred to. Thus I sign.

LESASSIER.

TOWN OF SAN FELIPE OF AUSTIN, *4th October*, 1833.

Using the power conceded to us by the laws, and in conformity to article 9th of the contract which we have made with the supreme government of the State, the denunciation is approved which is made by the attorney of Don Thomas de la Vega, of eleven leagues of land upon the left margin of the river Brazos, which is entirely vacant.

SAMUEL M. WILLIAMS,
*For himself and as attorney in fact for his partner.*

Mr. ALCALDE and COMMISSIONER:

The land which I have surveyed, in virtue of your decree, which precedes, for the attorney of Thomas Vega, is situated on the left margin of the river Brazos, at the point where there is an old town of the Tahuacanos Indians, and opposite to the town of the Huacos Indians, and bounded on the lower part by three leagues of land surveyed for the citizen José Antonio Manchaca, and has the lines, limits, boundaries, and corners, as follows: Beginning the survey at the upper corner of said land, at a stake, upon said margin of the river, from which twelve and six-tenth varas north, seventy-five degrees west, there is a tree called a "box elder," eight inches in diameter, and eleven and eight-tenth varas north, fifty-eight degrees west, there is another "box elder" six inches in diameter; thence from said stake ran a line north sixty-two degrees east; at three hundred and sixty varas, crossed the creek called Tahuacano, and at seventeen thousand and ninety-three varas created a stake, upon the upper line of the referred to land; from this point run another line north, twenty-eight degrees west, fourteen thousand one hundred and eighty varas, and created a stake in the plain; from this point run another line south, sixty-two degrees west, twenty-two thousand nine hundred and fifty-three varas to a stake on the river, for the upper corner, opposite the mouth of the river Bosque; from which two varas south, nine degrees east, there is a poplar six inches in diameter, and nine varas north, five and one-half degrees east, another poplar eighteen inches in diameter; from this point run down the river, following the meanders thereof to the place of beginning; containing a plane area of eleven leagues of land, or that which is the same, two hundred and seventy-five million square varas, bounded by the river, and on the lower side by the aforesaid mentioned lands of , and on the other side by vacant lands. The uplands of the river are covered with oak, ash, poplar, hackberry, and in the plains there is musquite, and is composed, according to my best judg-

ment, of two leagues of temporal and nine leagues of grazing land, and its figure is that shown on the annexed plan.

F. W. JOHNSON.

Most Excellent Señor Governor:

The citizen licentiate José Maria Aquirre, Rafael de Aquirre, and Thomas de la Vega, before your excellency explain, with due respect: That the law of colonization permits us, in the form and manner provided in article twenty-four, to acquire by purchase vacant lands in the State. Your excellency will be pleased to concede to each one of the petitioners eleven leagues of grazing land, on the river San Antonio, or in whatever other point may best suit us, all in one body or in different parcels, according to our will and election; for which we promise to pay the price designated by law, and to comply with all the other obligations which attach to us as purchasers, in which we will receive grace and favor.

JOSE MARIA DE AQUIRRE,
RAFAEL DE AQUIRRE,
THOMAS DE LA VEGA.

Leona Vicario, 14th day of June, 1830.

In conformity to article twenty-four of the law of colonization of the 24th day of March, 1825, I concede in sale to each one of the petitioners the eleven leagues of land which they solicit in the vacant lands of the State, in the place designated or in that most convenient, after the selection by the commissioner of the supreme general government a sufficiency for the payment of that which the State is indebted to the federation. The constitutional alcalde of the municipality to which belongs the referred to lands, shall give the possession of said leagues, and despatch the corresponding title, previously certifying the class and quality of them, for the ascertainment of that which ought to be paid to the State; for which payment I concede the terms designated in article twenty-two of the referred to law. Give by the secretary, for those interested, a copy of their petition and of this decree; so that, going with it to the commissioner, it may produce the effects which are consequent. This is a copy of the original, which remains in the archives of the secretary's office of my charge, to which I refer, whence I am commanded to take it, by the disposition of the most excellent señor the governor. Leona Vicario, 13th June, 1830.

SANTIAGO DEL VALLE,
*Secretary.*

Most Excellent Señor:

The citizen José Maria de Aquirre, for himself and in the name of those of like class, Thomas Vega and Rafael Aquirre, before your excellency, with the greater respect, says that, having petitioned from this

government, in the year 1830, the concession to them in the quality of a company, the leagues of land vacant of the State, which can be conceded to Mexicans in sale; and meeting no embarrassment in this pretension, said government was pleased to accede to it, agreeing, on the 14th day of June of the said year of 1830, that, as soon as the federation should have taken the lands, which was then pretended to be purchased from the State, that we should have the possession of the leagues which were conceded to us by the alcalde or alcaldes in whose jurisdiction they might be. It appears that now is the time to be able, without obstruction, to proceed to obtain the land which we have contracted for in the class of sale; and supposing it to correspond to some one of the enterprises of colonization, for the corresponding distribution of lands, the commissioner of surveys ought to be appointed. I pray of your excellency properly to resolve, that not only the alcaldes before whom we present ourselves shall proceed to give us the possession of the leagues which we select, but that, also, in case he cannot do so, the commissioner of surveys, in order to avoid thus whatever inconvenience may obstruct the possession which we ask, to your excellency we petition, properly to decree in conformity, in which we will receive justice.

JOSE MARIA DE AQUIRRE.

Leona Vicario, May 2d, 1832.

LEONA VICARIO, *2d of May*, 1832.

In view of the preceding petition, and in conformity to the disposition of this government in an order passed by the political chief of the department of Bexar, on the 2d day of June, 1830, I have come to nominate, so that he give possession of the lands which are indicated in this petition, the commissioner for the distribution of lands in the empresa to which belongs the leagues conceded to the petitioner and his companions; and in case they do not belong to any empresa, the first or only alcalde of the respective municipality, or that more immediate, so that, according to the rule of the instructions, and the orders operating on the subject, he proceed to give the indicated possessions. Give the interested party, by the secretary, a copy of his petition and this decree, that the effects may be had which are consequent.

LETONA.

SANTIAGO DEL VALLE,
*Secretary.*

This is a copy of the original which remains in the archive of this office of my charge, whence I was commanded to take it by the disposition of the most excellent señor the governor.

SANTIAGO DEL VALLE,
*Secretary.*

Leona Vicario, 2d May, 1832.

In the town of San Felipe of Austin, the 4th day of the month of October, one thousand eight hundred and thirty-three:

I, Luke Lesassier, constitutional alcalde of this town and its municipality, in use of the faculties conferred on me by the supreme government of the State, by decree made in Leona Vicario, the 2d day of May of the past year of 1832, inserted in leaf of this despatch, and in attention to the sale authorized by said supreme government in favor of the citizens José Maria de Aquirre, Rafael de Aquirre and Thomas de la Vega, to each one of eleven leagues of land, as appears by the superior decree of sale, made in the said city of Leona Vicario, the said 14th day of June of the year 1830, despatched by the secretary of the same supreme government, which, by an authenticated copy, has been presented by his attorney, Samuel M. Williams, entered at leaf of this despatch, its original being found in the despatch formed in favor of Don José Maria de Aquirre; and in attention to the superior order contained in the referred to decree of the 2d of May of the past year, and that of the most excellent vice governor of the date of the 29th day of the month of January of the present year, circulated by the señor the political chief of this department, on the 19th day of February past, declaring to remain without effect the proceedings dictated by the supreme government of the State, by which the citizens to whom lands have been conceded cannot take possession of them until the designation of the commissioner general of the nation, which ought to have been made, is verified; and the eleven leagues demanded by the interested party not belonging to any points conferred on the federation by the referred to order; and in view of the approbation given by the empresarios, Austin and Williams, inserted in the reverse of the first leaf of this despatch, the land belonging to the empresa of said empresarios, in conformity to the law of colonization of the State, of the 24th day of March, 1825; and in the name of the State, I confer and put in possession, real, actual, corporal, and virtual, the aforesaid attorney of Don Thomas de la Vega, of the eleven leagues of land, the same which he asks, and which the government sold him, upon the river Brazos, the situation, boundaries, limits, and corners of which are set out on the notes of survey arranged by the scientific and principal surveyor, Francis W. Johnson, in two leaves and the reverse of this despatch, with the configuration which the map annexed shows—the said lands which by said note of survey appear to be of the class of temporal in one league and a half, and of that of grazing in nine and one half leagues—I, the aforesaid alcalde and commissioner, in use of the faculty which the law gives me, declare and classify, according to which he ought to pay to the State the amount of one thousand one hundred and seventy-five dollars, according to the provision of article twenty-four of the referred to law of colonization of the date of the 24th day of March, 1825, and at the periods designated in article twenty-two of the same law, under the penalty established by the same. Therefore, using the faculty conceded to me, by the referred to decree of the supreme government of the State,

and the other dispositions of the same government on the subject by the law and consequent instructions which govern me, I despatch the present title, and command that a testimonio of it be taken and delivered to the interested party, so that he may possess and take the fruits of the land which has been sold to him *him*, his sons, heirs, and successors, or whom of him or of them shall have cause or right in representation, for such is the will of the State.

This given in said town of San Felipe of Austin, the date above, which I sign with witnesses of assistance, in conformity to law.

L. LESASSIER.

Of ass. HORATIO CHRISMAN,
Of ass. ROBERT PEEBLES.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I certify the foregoing to be a true and correct copy of the translation on file in the case of Jno. W. Lapsley vs. E. Spencer, No. 2,452 of the docket.

Attest: New Orleans, 6th January, 1858.

J. W. GURLEY, *Cl'k.*

WASHINGTON, D. C., *January* 19*th*, 1858.

It is hereby agreed between the counsel, plaintiff in error, and the counsel for the defendant, in the case of Eliphas Spencer vs. John W. Lapsley, No. 55 on the docket of the Supreme Court of the United States, that the foregoing and within copy, certified by J. W. Gurley, clerk of the circuit court of the United States in New Orleans, is rightfully and is hereby declared a part of the record in said court, and that the same shall be filed and considered as part of the bill of exceptions in said record, at p. 23.

J. P. BENJAMIN,
*For Pl'ff in Error.*
ROB. HUGHES,
*For Defendant in Error.*

Filed 22 Jan., 1858